NO. 80-2051

Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIDELITY UNION TRUST COMPANY, a banking corporation of the State of New Jersey, AS TRUSTEE UNDER THE GENERAL BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 8, 1953, AS SUPPLEMENTED; FIRST NATIONAL STATE BANK OF NEW JERSEY, a national banking association, AS TRUSTEE UNDER THE JUNIOR BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 7, 1962, AS SUPPLEMENTED,

Plaintiffs-Appellants,

v.

NEW JERSEY HIGHWAY AUTHORITY, a body corporate and politic created and existing under and by virtue of Chapter 16 of the laws of 1952, as amended and supplemented, and JAMES R. ZAZZALI, Attorney General of the State of New Jersey,

Defendants-Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

ARTHUR D. GROSSMAN,
Counsel for Appellee, New Jersey Highway Authority,
570 Broad Street,
Newark, New Jersey 07102.
(201) 622-3624

Fox and Fox,
Attorneys for Appellee,
New Jersey Highway Authority.

June 26, 1981

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 621-8611

TABLE OF CONTENTS

	PAGE
MOTION	2
STATEMENT OF CASE	2
THE FEDERAL QUESTION IS NOT SUBSTANTIAL	6
CONCLUSION	10

Cases Cited

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978)	6, 9
Rorick v. Board of Commissioners, 57 F. 2d 1048 (N. D. Fla. 1932), vacated on jurisdictional grounds, 307 U.S. 208 (1939)	8
Shapleigh v. San Angelo, 167 U.S. 646 (1897)	9
State ex rel. Warner v. Hoagland, 51 N.J.L. 62 (Sup. Ct. 1888)	8
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)	6, 7, 9

Statutes Cited

L. 1973, c. 370, Sec. 1	2
N.J.S.A. 27:12B-1 (New Jersey Highway Authority Act)	2
N.J.S.A. 27:12B-3(a)	7
N.J.S.A. 27:12B-4	8

NO. 80-2051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIDELITY UNION TRUST COMPANY, a banking corporation of the State of New Jersey, AS TRUSTEE UNDER THE GENERAL BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 8, 1953, AS SUPPLEMENTED; FIRST NATIONAL STATE BANK OF NEW JERSEY, a national banking association, AS TRUSTEE UNDER THE JUNIOR BOND RESOLUTION OF THE NEW JERSEY HIGHWAY AUTHORITY ADOPTED JULY 7, 1962, AS SUPPLEMENTED,

Plaintiffs-Appellants,

v.

NEW JERSEY HIGHWAY AUTHORITY, a body corporate and politic created and existing under and by virtue of Chapter 16 of the laws of 1952, as amended and supplemented, and JAMES R. ZAZZALI, Attorney General of the State of New Jersey,

Defendants-Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

Motion

The New Jersey Highway Authority (Authority) herewith submits this motion to dismiss the appeal from the judgment of the New Jersey Supreme Court on the ground that the appeal does not present a substantial federal question.

Statement of Case

Appellants-plaintiffs Fidelity Union Trust Company and First National State Bank (Appellants) are trustees under certain bond resolutions of the Authority. Appellants brought a declaratory judgment action in the Superior Court of New Jersey against the Authority and the Attorney General of the State of New Jersey seeking to invalidate an amendment to the New Jersey Highway Authority Act (N.J.S.A. 27:12B-1 et seq. [Act]), which conferred upon the Governor of the State of New Jersey and either the State Treasurer or Comptroller the right, in effect, to veto toll adjustments (L. 1973, c. 370, §1). Appellants alleged that the amendment constituted an unconstitutional impairment of the obligations of contract between the bondholders and the Authority.

The Superior Court of New Jersey held that the amendment impaired the contract rights of the bondholders of the Authority in violation of the Contract Clause of the Constitution of the United States and of the State of New Jersey and accordingly entered judgment in favor of the Appellants. The Authority and the Attorney General appealed. The Supreme Court of New Jersey granted the Attorney General's motion for direct certification. The Supreme Court, in reversing the trial court's decision, held that the amendment did not impair the bondholders'

contract rights so as to violate the Contract Clause of the Constitution of the United States or of the State of New Jersey.

The Supreme Court of New Jersey recited the following operative facts at the outset of its opinion (Appendix A, pp. 3a-7a):

> The Act created a body corporate known as the New Jersey Highway Authority. N.J.S.A. 27:12B-4. Its declared purposes were to construct, operate, maintain and improve "modern express highways embodying every known safety device including center divisions, ample shoulder width, long-sight distances, multiple lanes in each direction and grade separations at all intersections with other highways and railroads. . . ." N.J.S.A. 27:12B-2. The Authority was given specific powers to accomplish these purposes. Included were the power to fix, revise and collect tolls, N.J.S.A. 27:12B-5(i), and the authorization to issue bonds and notes to be secured by a pledge of all or any part of its tolls or revenues, N.J.S.A. 27:12B-9(a)(i). Furthermore, it was authorized to include a covenant with respect to the toll rates "to be established and charged" in a contract with the proposed security holders. N.J.S.A. 27:12B-9(a)(viii). The State pledged to all future holders of the bonds that it would not limit or restrict the rights vested in the Authority "to establish and collect such tolls or other charges as may be convenient or necessary to produce sufficient revenues to meet the expenses of maintenance and operation . . . and to fulfill the terms of any agreements made with the holders of bonds or notes . . . or in any way impair the rights or remedies of the holders. . . ." N.J.S.A.

27:12B-11. Moreover, the tolls were not to "be subject to supervision or regulation by any other commission, board, bureau or agency of the State." N.J.S.A. 27:12B-14. Some of the bonds to be issued, up to $285,000,000 in aggregate principal amount, were entitled to a state guarantee of payment of interest and principal. L. 1952, c. 17, §1 (current version at N.J.S.A. 27:12B-20).

When first created, the Authority consisted of three members appointed by the Governor with the advice and consent of the Senate. Two members constituted a quorum and the vote of two was necessary for motions or resolutions. L. 1952, c. 16 §4 (current version at N.J.S.A. 27:12B-4). Subsequently, the membership was increased to five, three being necessary for quorum and action. L. 1970, c. 28, §1 (current version at N.J.S.A. 27:12B-4). The Act was amended again to provide for seven members, four being necessary for a quorum and action. N.J.S.A. 27:12B-4 (as amended by L. 1975, c. 5, §1).

The specific highway project which the Authority was directed to undertake was construction of "The Garden State Parkway" from Route 17 in Paramus to Cape May. N.J.S.A. 27:12B-20. The Authority issued and sold bonds of various series to finance the cost of that construction. The road was thereupon built and subsequently extended and enlarged. It has been a successful project. According to the Authority's 1977 Annual Report there were 196,390,000 toll trips in that year. Indeed bond interest and bond service (interest and principal amount due on maturing bonds) were covered 3.496 and 1.317 times, respectively. The standard toll

on the Parkway since its inception more than 25 years ago has been 25 cents.

Plaintiffs, as trustees of several Authority bond issues, sought to invalidate the amendment to the Act effective January 4, 1974, a date subsequent to the issuance of the bonds. See L. 1973, c. 370, §1 (amending N.J.S.A. 27:12B-4). That amendment reads in pertinent part as follows:

(text omitted)

It is this change, the requirement that revision of the tolls by the Authority may not be effective without the prior written approval of the Governor and the state treasurer or comptroller of the treasury, that the trustees contend violates the Contract Clauses of the federal and state constitutions.

The terms and conditions of each bond series of which the Fidelity Union Trust Company is trustee are prescribed in a General Bond Resolution adopted by the Authority on July 8, 1975 and in supplemental resolutions authorizing the particular series.[3] (footnote omitted). First National State Bank is the trustee of Junior Revenue Bonds, issued pursuant to a Junior Bond Resolution and a First Supplemental Junior Bond Resolution adopted on July 7, 1962.[4] (footnote omitted).

The Federal Question is Not Substantial

The Supreme Court of New Jersey properly applied the principles of *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978).

Appellants allege that the decision of the New Jersey Supreme Court contravenes this Court's decisions in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978). It is respectfully submitted that the contention of the Appellants is without merit.

Following a recitation of the operative facts and a brief history of decisions construing the Contract Clause, the New Jersey Supreme Court carefully analyzed the Court's decisions in *United States Trust* and *Allied Structural Steel* (Appendix A at pp. 9a-12a). Based upon that analysis, the New Jersey Supreme Court framed the following issues:

> "(1) What were the terms of a financial agreement between the parties? (2) Was there an impairment of a financial condition of the contract? (3) If so, was it substantial? (4) Since the contract was with the State, did the State have the ability to limit its power to act in the future with respect to the administration of the New Jersey Highway Authority Act?" (Appendix A, p. 12a).

It is respectfully submitted that the New Jersey Supreme Court's analysis of these issues was consistent with the principles set forth in *United States Trust* and *Allied Structural Steel.*

I

The terms in the bond resolutions and the provisions of the Act constitute the contract with the bondholders. Pursuant to N.J.S.A. 27:12B-3(a), the Authority is defined to include "the board, body or commission succeeding to the principal functions therof or to whom the powers given by this act to the Authority shall be given by law." This statutory definition was incorporated in the various bond resolutions.

As noted by the Supreme Court of New Jersey, it was therefore manifest that bond purchasers "knew that the Authority as it existed might not remain the same throughout the life of the bonds. The Authority's composition, size or even existence were not frozen." (Appendix A, pp. 12a-13a). The New Jersey Supreme Court went on to note that "the bondholders could harbor no reasonable expectation that the existence of the Authority or its composition was immutable." (Appendix A, p. 13a). The New Jersey Supreme Court properly concluded that all that occurred was a change in the structure of the governance of the Garden State Parkway, that such a change was within the scope of the terms of the bond resolutions and Act, and that no modification of the bond terms was involved since the obligation to establish and collect tolls to produce sufficient revenues remained unimpaired.

II

As noted by the New Jersey Supreme Court, unlike the amendments involved in *United States Trust* and *Allied Structural Steel*, the instant amendment did not involve a substantial financial condition of the agreement between the parties. The various bond resolutions required that the Authority establish and collect sufficient tolls so that total

net revenue in each year equaled at least 120% of the total debt service for the year (a condition historically satisfied by the Authority). This financial security remained unaffected by the amendment. Indeed, the amendment expressly provides that the Governor and the State Treasurer or Comptroller must exercise their powers "with due regard for the rights of the holders of bonds of the Authority at any time outstanding, and nothing in, or done pursuant to, this section shall in any way limit, restrict or alter the obligation or powers of the Authority . . . to carry out and perform in every detail each and every covenant, agreement or contract . . . entered into by or on behalf of the Authority with respect to its bonds or for the benefit, protection or security of the holders thereof." (N.J.S.A. 27:12B-4).

The New Jersey Supreme Court properly concluded that there had been no substantive alteration in terms of the bonds and that at most, there had "been a change in the identity of the individuals charged with assuring that the interest of the bondholders and the public in toll adjustments is safeguarded." (Appendix A, p. 18a). In support of its conclusion, the New Jersey Supreme Court cited numerous cases supporting the proposition that a legislature may substitute officers who administer a project, without contravening the Contract Clause. See e.g., *State ex rel. Warner* v. *Hoagland*, 51 N.J.L. 62 (Sup. Ct. 1888); *Rorick* v. *Board of Commissioners*, 57 F. 2d 1048 (N. D. Fla. 1932), vacated on jurisdictional grounds, 307 U.S. 208 (1939).

III

The New Jersey Supreme Court further concluded that even if the amendment was deemed to be a modification of the contract between the bondholders and the Authority,

that modification was not substantial. It cited the *United States Trust* and *Allied Structural Steel* cases for the proposition that not every impairment is violative of the Contract Clause. The impairment must be a substantial one.

As set forth by the New Jersey Supreme Court, Appellants did not demonstrate any adverse financial impact upon the bonds as a result of the amendment. The only evidence before the trial court on this issue were affidavits submitted by the Authority stating that the amendment had no effect on the market value of the bonds.

IV

Finally, the New Jersey Supreme Court raised serious doubts as to whether the State of New Jersey could have lawfully bargained away its right to modify the structure of the government of the Authority. The New Jersey Supreme Court cited with approval Justice Blackman's statement in *United States Trust* that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." (431 U.S. at 23). One of those powers involves the organization of government. As stated by the New Jersey Supreme Court, "the Contract Clause has never been construed or applied as an obstacle to the exercise of the State's authority to change the structure governing a public entity." (Appendix A, p. 24a). The New Jersey Supreme Court relied upon the case of *Shapleigh* v. *San Angelo*, 167 U.S. 646 (1897), wherein the Court stated:

> "The State's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them all together, is not restricted by contracts entered into by the municipality with its creditors or with private parties." (167 U.S. at 654).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should dismiss the appeal from the judgment of the New Jersey Supreme Court.

Respectfully submitted,

ARTHUR D. GROSSMAN,
Counsel for Appellee
New Jersey Highway Authority

Dated: June 26, 1981